

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-16973

Chapter 7

EARL JEWEL BLANKS, III

Debtor

MEMORANDUM AND ORDER

The bankruptcy trustee in this chapter 7 case has filed a motion to compel turnover of records of the debtor's account with American Express Travel Related Services Company ("American Express"). The trustee sent American Express a letter requesting the records. American Express replied with a letter stating, in effect, that it would turn over the records only if it received a subpoena from the court.

The trustee's motion alleges:

1. The debtor in this case has an unusually large amount of credit card debt.
2. The trustee has requested information from various credit card holders, including American Express, requesting a transaction history of the debtor's account.
3. As evidenced by the attached letter, American Express has a policy of refusing to provide this information to the trustee in the absence of appropriate Orders issued by the Court.
4. This recorded information is essential to the trustee fulfilling his responsibility in evaluating the liabilities and purchases made within twelve (12) months preceding the filing of the bankruptcy proceeding.

The motion requests an order directing American Express to turn over the debtor's records for the six months prior to bankruptcy and requiring American Express to pay the trustee's expenses in obtaining the records.

American Express filed a response to the trustee's motion. American Express makes two points in support of its refusal to turn over the records to the trustee without a subpoena. First, the Right to Financial Privacy Act (the Privacy Act) prevents it from turning over the records without a court order. The Privacy Act is codified at 12 U.S.C. §§ 3401–3422.

Second, even if the Privacy Act does not apply, the bankruptcy trustee must follow the usual procedures required by the bankruptcy statutes and rules to compel American Express to furnish the records because the statutes and rules do not require a creditor to furnish records to the bankruptcy trustee simply on the basis of a letter requesting the records. In particular, American Express relies on Bankruptcy Rule 2004. *Fed. R. Bankr. P.* 2004.

Whether the Privacy Act applies depends on whether the bankruptcy trustee is a “government authority.” The Privacy Act defines a “government authority” as “any agency or department of the United States, or any officer, employee, or agent thereof.” 12 U.S.C. § 3401(3). American Express contends the trustee fits this description because he was appointed to the panel of trustees by the United States Trustee, the United States Trustee supervises his work, and the United States Trustee system is part of the United States Department of Justice. *See* 28 U.S.C. §§ 581-589a. One court has rejected the contention that a bankruptcy trustee is a “government authority” under the Privacy Act. *In re Financial Corporation of America*, 119 B.R. 728 (Bankr.

C. D. Cal. 1990). Cases from other contexts support the conclusion that a bankruptcy trustee is not an employee or agent of the United States or any department or agency of the United States. In *Wells v. United States*, 98 B.R. 806 (N. D. Ill. 1989), the court held that the bankruptcy trustee is not an agent of the United States government for tax purposes. *See also, In re Hughes Drilling Co.*, 75 B.R. 196 (Bankr. W. D. Okla. 1987).

In another case, a bankruptcy trustee brought an age discrimination suit against the United States Trustee who did not reappoint him. The court held that the bankruptcy trustee did not have a cause of action because he was not an employee of the United States Trustee. *Kuchan v. Heston*, 143 B.R. 768 (W. D. Wash. 1992).

For purposes of due process, an employee of the federal government may have a property interest in continued employment. *Compare Hannon v. Turnage*, 892 F.2d 653 (7th Cir. 1990) and *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980). A bankruptcy trustee, however, does not have a property interest in reappointment. *Richman v. Straley*, 48 F.3d 1139 (10th Cir. 1995). This result also suggests that a bankruptcy trustee is not an employee of the federal government.

Of course, the United States Trustees, the Assistant U. S. Trustees, and employees in their offices are employees of the federal government. *Richman v. Straley*, 48 F.3d 1139 (10th Cir. 1995); *In re Restaurant Development of Puerto Rico, Inc.*, 128 B.R. 498 (Bankr. D. P. R. 1991); 28 U.S.C. §§ 582 & 587-589.

The United States Trustee does not, however, hire the bankruptcy trustees as employees or agents. The United States Trustee appoints individuals to the panel of “private”

trustees. 28 U.S.C. § 586(a)(1). The individuals are usually attorneys in the private practice of law. They earn commissions for their work as bankruptcy trustees much as they earn fees for legal representation of clients. The bankruptcy trustee's compensation comes from the assets in a case and the filing fee. 11 U.S.C. §§ 326 & 330; 28 U.S.C. § 586(b) & (e). Though the filing fees are passed through the government's hands, the payment essentially comes from the debtors who pay the filing fees. This is not the same as being paid as employees of the federal government.

The supervisory powers of the United States Trustee are also limited. 28 U.S.C. § 586(a)(1), (a)(3)(A),(G). A bankruptcy trustee can decide on the details of administering a bankruptcy case — such as deciding whether to object to a claim, file a complaint, abandon property, assume or reject a contract, or object to exemptions — without prior approval by the United States Trustee.

Furthermore, a bankruptcy trustee represents the bankruptcy estate. 11 U.S.C. § 323(a). The bankruptcy estate is not a part of the federal government. The trustee generally administers the bankruptcy estate for the benefit of the debtor's unsecured creditors. *See, e.g. Steinberg v. Bucynzski*, 40 F.3d 890 (7th Cir. 1994); *In re Speir*, 190 B.R. 657 (Bankr. N. D. Ala. 1995); *Industrial & Municipal Engineering, Inc. v. McCord Auto Supply, Inc.*, 178 B.R. 753 (Bankr. C. D. Ill. 1995). The trustee's duties may require him to oppose the interests of the federal government. For example, the trustee may object to the government's claim, oppose its motion for relief from the automatic stay, or seek to recover property transferred to it by the debtor.

Finally, the court must point out that creditors in a Chapter 7 or 11 case can elect a trustee who is not a member of the panel of private trustees selected by the United States Trustee. Indeed, the appointed trustee continues to serve only if creditors do not elect a trustee. 11 U.S.C. §§ 701-703 & 1104(b).

The court concludes that the bankruptcy trustee is not an agent or employee of the federal government or any of its departments and agencies. Therefore, the Privacy Act does not prevent American Express from turning over to the trustee records of the debtor's account with American Express.

This leaves the question of whether the trustee is entitled to obtain the records simply by requesting them. American Express contends the records in its possession are not property of the bankruptcy estate. American Express relies on *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). The government had obtained the defendant's bank records without a search warrant. The Supreme Court held this was not an unconstitutional search and seizure. The Supreme Court reasoned that the defendant had no privacy interest in the bank's records. At one point, the Supreme Court said:

On their face, the documents subpoenaed here are not respondent's "private papers." Unlike the claimant in *Boyd*, respondent can assert neither ownership nor possession. Instead, these are business records of the banks.

96 S.Ct. 1619, 1623.

American Express interprets this to mean that the debtor has no interest in the records that could become property of the bankruptcy estate. Section 542(e) of the Bankruptcy Code, provides:

Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

The Bankruptcy Code defines “person” to include corporations such as American Express.

Section 542(e) suggests that the records held by American Express are subject to turnover even if they are not property of the bankruptcy estate. Section 541 defines property of the estate. It includes property recovered by the trustee under several sections of the Bankruptcy Code but not property subject to turnover under § 542. 11 U.S.C. §541(a)(3). This is consistent with subsections (a) through (d) of § 542 because they deal with property of the estate or property of the debtor. 11 U.S.C. § 542(a)–(d). The information subject to turnover under § 542(e), however, appears to include property that is not necessarily property of the estate or the debtor. *Underwood v. Hilliard (In re Rimstat Ltd.)*, 98 F.3d 956, 965 (7th Cir. 1996) (“Some records of a corporation might not be the corporation’s property in the literal sense of being owned by it.”). Section 542(e) does not make a distinction between records kept by the debtor’s agents on his behalf—such as records kept by his attorney or accountant—and records kept by a creditor—such as American Express—that are its own business records.

The distinction is academic in this case. The debtor has a right to copies of the records. American Express admitted this at the hearing. Technically this may not make the records themselves property of the bankruptcy estate, but the effect is almost the same. The debtor's rights under his contract with American Express are intangible personal property that became property of the bankruptcy estate. *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339 (9th Cir. 1983); *In re Bobbitt*, 174 B.R. 548 (Bankr. N. D. Cal. 1993); *American Central Airlines, Inc. v. O'Hare Regional Carrier Scheduling Committee (In re American Central Airlines, Inc.)*, 52 B.R. 567 (Bankr. N. D. Iowa 1985); *Waldschmidt v. CBS, Inc.*, 14 B.R. 309 (M. D. Tenn. 1981); *Medor v. Lamb (In re Lamb)*, 47 B.R. 79 (Bankr. D. Vt. 1985). The debtor's right to copies of the records was itself property that passed into the bankruptcy estate.

Since the debtor's right to copies is property of the bankruptcy estate, the bankruptcy trustee can exercise the right unless it is limited by the Bankruptcy Code, other federal law, or state law. The court has decided that the Privacy Act does not bar the trustee from obtaining the records, and American Express has cited no other basis.

As to procedural limits, the trustee has complied with § 542(e). By declining to turn over the records, American Express has had a hearing and an opportunity to raise any privilege that might apply. It has not asserted any privilege. The trustee also served the debtor and the debtor's attorney with the motion to compel turnover. The debtor has not opposed the motion.

Even if the trustee should have filed a complaint instead of a motion, it makes no difference in this proceeding. American Express has not objected to the procedure, and the parties

have had a full and fair opportunity to litigate the issues. *In re Mark Twain Industries, Inc.*, 115 B.R. 948 (Bankr. N. D. Ill. 1991).

In a situation such as this, the trustee should usually be able to obtain records simply by sending a written request to the creditor. Having succeeded to the debtor's right to the information, the trustee will be entitled to copies of the records. The court is assuming the trustee's request to the creditor adequately reveals his status as trustee and identifies the debtor.

A creditor with records subject to turnover should not force the trustee to seek turnover under § 542(e) when it has no genuine basis for opposing disclosure. Likewise, the creditor should not force the trustee to use Rule 2004 or other discovery rules since the trustee has succeeded to the debtor's right to copies of the records.

In an appropriate case, the trustee may recover costs for being unnecessarily forced to bring a proceeding under § 542(e). *Robb v. Sowers (In re Sowers)*, 97 B.R. 480 (Bankr. N. D. Ind. 1989); *Ledford v. Fidelity Financial Services (In re Hill)*, 174 B.R. 949 (Bankr. S. D. Ohio 1994). Costs should not be imposed on American Express in this proceeding. American Express had reasonable doubts as to whether the law allowed it to turn the information over to the trustee without a subpoena or court order. *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 135 B.R. 659 (Bankr. D. Colo. 1991); *Parkinson v. Bradford Trust Co. (In re O'Brien)*, 50 B.R. 67 (Bankr. E. D. Va. 1985).

For the reasons foregoing,

It is ORDERED that American Express Travel Related Services Company, Inc., shall forthwith turn over records of the debtor's account to the duly elected trustee in this case.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

ENTER:

BY THE COURT

entered August 12, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE